Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

GEORGE DAVID SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April, 1994
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QUESTIONS PRESENTED

This case presents Sixth Amendment issues arising from joint representation. It arises from a prosecution for cultivating marijuana. Petitioner steadfastly denied he was responsible for growing marijuana on his mother's rural land, although he and an acquaintance were surprised by law enforcement agents while searching for a stray goat at the site of the marijuana. The same attorney represented Petitioner and the codefendant.

The Court of Appeals found no conflict of interest from this joint representation, and held that counsel's failure to identify Petitioner's brother as possibly the man seen on a hidden surveillance camera on an earlier occasion was not prejudicial. This case presents the following questions:

1. In a case in which the deadlocked jury, after once being instructed to continue deliberations, tells the trial court, "we feel the only evidence that is capable of persuading a change of the vote will be our viewing the videotape" of a man at the scene of marijuana cultivation,

   a. is defense counsel's performance deficient for failing to introduce evidence that defendant's brother could have been the man on the tape and met defendant's physical description, and had access to and frequented the location; and

b. was the defense prejudiced by counsel's failure to show another plausible suspect at the scene?

2. Was counsel's inability to urge the codefendant to testify to bolster Petitioner's testimony an adverse effect on his representation which violates the Sixth Amendment rights of Petitioner.

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Opinions Below.

The Opinion of the United States Court of Appeals for the Tenth Circuit and the Order denying rehearing are unreported, but are reproduced in the Appendix.

Jurisdiction.

The order and judgment of the Court of Appeals was rendered on December 17, 1993. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc. The Court of Appeals denied that petition by order dated February 2, 1994.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291. The District Court had jurisdiction pursuant to 21 U.S.C. §§ 841(a)(1), 846, 856(a)(1).

Constitutional Provision Involved.

The Sixth Amendment to the United States Constitution states:

> **Rights of the accused.**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to **have the Assistance of Counsel for his defense.** [emphasis added]

STATEMENT OF THE CASE

The evidence at trial may be summarized as follows.

Federal agents discovered cultivated marijuana growing in a field located in a remote area of Oklahoma. The agents set up a hidden video camera which operated automatically by an infrared sensor.

This video camera did not produce any audio recording of what was being filmed.

The jury was shown considerable videotape (taken over several days), most of which consisted merely of the marijuana and surroundings, without any human subject-matter depicted. Two portions of the videotape, however, showed the presence of individuals. The first such portion showed a masked adult Caucasian male tending the marijuana, and at one point the mask was removed from his face, although he remained some distance from the video camera.

The second portion of the videotape (filmed on a different date) showed George David Smith and Robert Troy Bailey in the marijuana field, but did not show them engaged in any obvious criminal activity there.

The second such portion of videotape was recorded at a time when certain Federal and State agents happened to be hidden in the brush surrounding the marijuana patch. They had difficulty in hearing Smith and Bailey, but did hear some conversation which they interpreted as being incriminating, and then surprised Smith and Bailey by announcing their presence. Smith screamed and began to run, but stopped a short distance away and surrendered. Bailey did not flee.

Subsequently, the agents went to Smith's property and found 5 marijuana plants inside a small shed 150 yards from Smith's home. Found inside Smith's home were fertilizer and plastic which could be used to cultivate marijuana. Outside Smith's home was found a four-wheel motor vehicle, and four-wheeler tracks had been observed by the agents leading to the marijuana patch in question. The search

of Smith's home and its curtilage was conducted with Smith's consent.

At jury trial, Smith took the witness stand and testified that he was not the masked man shown in the first portion of the videotape which the jurors had already seen. He testified that he and Bailey had stumbled upon the marijuana patch while searching for a sick goat, and were looking it over when the agents jumped out of the bushes and surprised them. (Aplt. App. at 40-47, 52-53).

Smith denied making any incriminating statements and denied any prior knowledge of the marijuana patch. He further testified that the shed where marijuana was found is near a lagoon which is widely regarded as a public "swimming hole" frequented by area youths. (Aplt. App. at 50-51, 59-61).

A defense witness, James Wendell Nelms, confirmed that the shed is located next to the lagoon, a well-known "hangout" for teenagers and young adults who go there to swim and "party." (Aplt. App. at 14-18).

Another defense witness, Harland Stonecipher, testified that Smith has a reputation in the community as an exemplary citizen. Stonecipher also testified that he (Stonecipher) and others who reside in the area have had similar problems with people surreptitiously growing marijuana on isolated parts of their lands. (Aplt. App. at 19-28).

Finally, Smith's wife testified that she herself uses all the fertilizer found by the agents on her fruit trees and that she was not aware of any criminal conduct on the part of her husband. (Aplt. App. at 29-33).

During deliberations, the jurors requested that they be permitted to review the videotape, but the trial judge denied their request. (Aplt. App. at 70-74). After four hours of deliberation, the jurors informed the trial judge that they were unable to reach a unanimous verdict. The trial judge instructed them to deliberate further. (Aplt. App. at 75-76).

Later, the jury for the second time requested to have the videotape shown, stating:

> We are unable to reach a unanimous decision on any count. And we feel the only evidence that is capable of persuading a change of the vote will be our viewing the videotape taken on August 10th and 15th. No one feels their opinion will be persuaded otherwise without reviewing the tape. I'm doing the best I can. Signed Gary Johnson.

This time the trial judge relented, over defense objections. (Aplt. App. at 78-81).

After re-viewing the videotape, the jurors were instructed to go back to the jury room and continue deliberations. Approximately one hour later, the jury announced that it had reached a verdict.

In proceedings on defense Motions for New Trial defendants submitted affidavits which indicated that Petitioner's brother may have been the man on the earlier videotape, and that the codefendant Bailey was a drug and alcohol counselor and had wanted to testify and had significant character witnesses, but had been advised against testifying by joint defense counsel.

Petitioner's affidavit verified the following statements from his brief in support of his Motion for New Trial:

> David Smith has a biologic brother named Barry Smith. Barry is one (1) year younger than David. Barry is a man of the same approximate height, weight, and build as David. Both Barry and David Smith have dark hair whose length is medium, and both often wear Western attire.
>
> The marijuana field in question was located upon land owned by the mother of Barry and David Smith. Barry had unrestricted access not only to his mother's land but also to the land and home owned by David.
>
> Barry Smith frequented his mother's land and David's home. He had free access to the shed in which marijuana was found. Barry also had access to four-wheel vehicles, including the one found on David's property.

Appendix to Court of Appeals Brief at 86-87.

The Petitioner's affidavit itself stated:

> My name is George David Smith. I am one of the Defendants in this case. I have personal knowledge of the facts described in this Affidavit.

I have reviewed the Brief written by my lawyer, Donald M. Bingham, which describes my natural brother, Barry Smith, and Barry's access to my property and my mother's property. The statements in my lawyer's Brief about my brother Barry Smith are true.

My lawyer's statements in the Brief about my use of my mother's land and my cattle business activities with my mother are true.

I now believe that it was a serious mistake to use the same lawyer as my co-defendant Bob Bailey. The testimony of Bob Bailey would have helped my defense considerably, since Bob would have testified truthfully that he and I were not engaged in any marijuana cultivation or other illegal activity and that both of us are innocent of any crimes. Also, Bob would have testified truthfully that he and I did not make the statements testified to by Government witnesses at trial.

If I am granted a new trial, I intend to have my own lawyer, independent of the lawyer who represents Bob. If a new trial is granted, I would try to call Bob as a witness in my defense, and I believe that he would testify in my defense and confirm my version of the

> events on the day we were arrested.

Appendix to Court of Appeals Brief at 88-89.

The codefendant Bailey submitted the following affidavit to the District Court:

> I am an adult man of 49 years of age. At the time of my trial I was gainfully employed as an alcohol and drug counselor at the Recovery Way at Hugo, Oklahoma and had been so employed for over 2 years. I have no prior felony convictions. I have made no admissions against my interest in this cause and had absolutely no reason to not testify at my trial.
>
> It was my intention to testify at trial and explain my absolute lack of involvement in the criminal allegations made against me. Three reputable persons from my community agreed to and were available to testify as to my reputation for being a law-abiding truthful person. Those character witness were Judy Strickland (Executive Director of Youth Services at Hugo, Oklahoma), Bill Pitts (Program Director at

Recovery Way; he was my boss), and G.W. Collins (Assistant Chief of Police at Hugo). It was my intention that these people testify in my behalf at trial.

My trial counsel, Mr. Warren Gotcher, came highly recommended to my Co-Defendant and me. Together we hired Mr. Gotcher to represent the two of us. Although the concept of "conflict of interest" was used in my presence, I realize now that I did not understand its use in the context of legal representation. I was told by Mr. Gotcher in Mr. Smith's presence that the only effect of having separate counsel would be to have another attorney at the defense table and to increase my attorney fees, and the other lawyer would make a closing argument for me.

I have never had any involvement in trial matters and at all times I sought guidance from my attorney, but I did not receive meaningful guidance from him. Toward the close of trial, Mr. Gotcher spoke to me for the first time about the possibility of my not testifying. I had then and I have now absolutely no reason for not testifying, except that Mr. Gotcher suggested to me that it might be better if I did not testify. He did tell

me that the choice of whether to not testify was my choice; however, in the same breath he made it clear that although he had some reservations about the matter, that he was suggesting to me that I not testify. I was perplexed about his suggestion since I felt I needed to testify, had planned to testify, had no reasons to not testify, and had character witnesses available and willing to testify. However, when it came right down to it, I followed my lawyer's suggestion and did not testify. Mr. Gotcher said he could not see what could be gained by my testimony and then discharged my witnesses on Tuesday, November 3, 1992, the day before I was to testify.

I am not guilty of the crimes charged in the indictment and was with David Smith for the sole purpose of trying to locate the goat just as David Smith testified at trial.

All in all, I did not receive any clear cut advice from Mr. Gotcher about his professional opinion whether I should testify and was left to guess at whether I should testify. I was left to grasp at straws and guess at Mr. Gotcher's advice. I really became nervous when I learned my lawyer asked Harland

> Stonecipher, a man who had attended only a small part of the trial whether Mr. Stonecipher thought I should testify. Similarly, I was very puzzled by my lawyer asking my Co-Defendant of his opinion of whether I should testify. All of this gave the appearance to me that my lawyer did not know what he should recommend to me about testifying and for that reason could not or would not give me any clear cut advice on this matter. This further shook my confidence, but I did not have anyone to turn to but my lawyer. Instead of relying on my common sense, I relied on the advice I was paying for and I never should have done that. If I had understood the significance of not testifying I would have testified and demanded that he call my character witnesses to testify.

Appendix to Court of Appeals Brief at 99-101.

Petitioner submitted the following affidavit to the District Court as well:

> I am the Co-Defendant of Robert Troy Bailey. We were both convicted in this court by a jury on November 4, 1992 of the charges made against us.

Together Mr. Bailey and I hired Mr. Warren Gotcher to represent us at trial. Mr. Bailey and I discussed the case with one another prior to trial, both in the presence of Mr. Gotcher and out of the presence of Mr. Gotcher. Mr. Bailey has always maintained his innocence and intended to testify in his own behalf as well as intending to present character witnesses for himself. Although I am a lay person with no experience in the law, I could not imagine any reason why Mr. Bailey would not testify and present character witnesses just as I did. Mr. Bailey knew what might be called my "trial strategy" and I knew his. We were planning to take the same approach at trial until after I testified and then Mr. Gotcher began to raise the possibility of Mr. Bailey not testifying. This change in plans and giving up his right to testify made Mr. Bailey uneasy. I was present when Mr. Bailey would ask Mr. Gotcher for his advice on this newly proposed approach. Although Mr. Gotcher would generally respond in terms such as "it's Mr. Bailey's decision," you could tell that he was suggesting Mr. Bailey not testify.

> Mr. Bailey and I both relied on Mr. Gotcher, but his vague responses and suggestion that Mr. Bailey not testify left me and Mr. Bailey both uneasy. We were made more uneasy by Mr. Gotcher asking non-lawyers like Harland Stonecipher whether Mr. Bailey should testify. However, I know from knowing Mr. Bailey and our being in the defense of this case together that Mr. Bailey was relying on Mr. Gotcher to advise him on whether to testify and regardless of what Mr. Gotcher was saying about "it being up to Bob," that for some reason, Mr. Gotcher was really suggesting that Mr. Bailey not testify and that's the only reason Mr. Bailey did not testify.

Appendix to Court of Appeals Brief at 102-103.

Petitioner also submitted the affidavits of Judy Kay Strickland and Harland Stonecipher to the District Court:

> My name is Judy Kay Strickland. I am the Executive Director of Youth Services in Choctaw and Pushmataha Counties. Our agency provides

counseling services to youth and their families throughout the two counties. We work closely with the area schools, law enforcement agencies, the courts, and provide crisis intervention when needed. As Executive Director, I am responsible for the operation of programs in both counties and have a staff of three Counselors and an Administrative Assistant.

I was present at the Federal Courthouse in Muskogee, Oklahoma on Tuesday, November 3, 1992 to testify as a character witness on behalf of Robert T. Bailey. On this date two character witnesses were present to provide testimony on Mr. Bailey's behalf, Bill Pitts (Robert's employer) and myself. The third witness, Assistant Police Chief, G.W. Collins was unable to attend court on Tuesday, but would be available to testify on Wednesday.

The testimony that I was prepared to give related to Robert Bailey's reputation as a law abiding and truthful individual. I have known Robert both personally and professionally for several years. I have worked with Robert at Recovery Way, an Adolescent Alcohol and Drug Treatment Center, located in Hugo, Oklahoma, where he is

employed as a primary Counselor and maintains a case load of three to five adolescents for a duration of 30-40 days each. To the best of my knowledge, Robert had not been involved in any unlawful acts. His reputation throughout the county is one of honesty and concern for others.

I remained at the Federal Courthouse throughout the day on November 3, 1992 and on three occasions I attempted to talk with Robert's Attorney, Warren Gotcher, concerning my testimony. During a conversation in the hallway of the Courthouse at the close of court on Tuesday, I was informed by Mr. Gotcher that Robert's character witnesses would not be needed. I also overheard at this time, Robert's Attorney discussing with him that he did not need to testify on his own behalf; he could if he wanted to, but Mr. Gotcher felt that there was no need. At the time it appeared that Robert was seeking guidance and advise from his Attorney about testifying since he was unfamiliar with such proceedings, and his Attorney seemed to be offering no meaningful advice.

Appendix to Court of Appeals Brief at 104-105.

Harland C. Stonecipher, Petitioner's character witness, provided the following affidavit:

> TO WHOM IT MAY CONCERN:
>
> On November 3, 1992, I appeared in Federal Court in Muskogee, OK as a character witness for David Smith. Judge Seay was the presiding judge of this trial.
>
> I did not sit in the court room prior to my being called as a witness. I waited in the hall outside the court room; and as a result, I had no real knowledge of what had occurred during the trial.
>
> After appearing as a witness, I returned to the hall and waited there until the court adjourned for the day. Upon its adjournment, and after all jurors had left the court room, I approached the defense table around which attorney Warren Gotcher and defendants David Smith and Bob Bailey were standing.
>
> I asked Mr. Gotcher how did it go. Mr. Gotcher replied that David did a good job and he

> felt the jury believed him. Mr. Gotcher said to me, "I am having a problem deciding if I should put Bob on the stand. Mr. Gotcher said, "Harland, what do you think?" I was caught by surprise by his question and replied, "I don't know - I haven't heard any of the testimony in the trial - that is a call you will have to make. Mr. Gotcher said something to the effect, "I just don't know if I should or should not put him on." I responded to that by saying, "I would put him on the stand." Mr. Gotcher said, "I will think about that tonight."

Appendix to Court of Appeals Brief at 106.

SUMMARY OF THE ARGUMENT

The Court of Appeals departed from this Court's pronouncements in its failure to find prejudice arising from counsel's deficient performance in the present case. The inability of the jury to reach a verdict until it had reviewed the videotape makes it certain that the

tape was the crucial evidence which convicted George Smith. His counsel's failure to point out the obvious possibility that George Smith's brother Barry was the man on the earlier tape, and was thus responsible for the marijuana cultivation, was a clearly deficient performance which prejudiced Petitioner. The Court should grant certiorari to correct the Court of Appeals' departure from the proper constitutional standard.

Likewise, the Court of Appeals departed from this Court's pronouncements, and from those of other Courts of Appeals, on the Sixth Amendment law of conflicts of interest in joint representation. The Court of Appeals effectively required a finding of prejudice arising from what it conceded was a technical conflict of interest. This requirement is not founded in the

Sixth Amendment. Instead, the Court of Appeals should have found that joint counsel's inability to urge codefendant Bailey to testify was sufficient "adverse effect" to find a constitutional violation.

PROPOSITION I.

COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICED PETITIONER

A. The need to explain the man on the earlier videotape.

Petitioner and his codefendant Bailey were arrested by law enforcement agents at the site of cultivated marijuana. The agents testified to supposed incriminating statements by Petitioner, while Petitioner testified to his innocent presence in the field, looking for a sick goat which had strayed from his rural home some two hundred yards away. Thus, the jury was confronted by conflicting accounts of the

arrest and had to make a credibility determination regarding the conflicting testimony.

The codefendant Bailey was ready, willing, and able to corroborate Petitioner's testimony and to bring credible character witnesses from law enforcement and from his employment as a drug and alcohol counselor.

Part of the evidence used by the government was a videotape taken by a concealed camera. That camera recorded the arrest, but also recorded an unknown man at an earlier time tending the marijuana. We can say with absolute certainty that this evidence tipped the scales of the credibility determination in favor of conviction because the jury reported that it could not reach a verdict on any count without reviewing this videotape again. After seeing that evidence a second time, the jury convicted both defendants on all counts.

It takes no great hindsight to understand the objective of defense counsel under these circumstances. Counsel needed to do everything possible to bolster the credibility of the Petitioner in his account of innocent activity. Two principal means were available to do that. First, Petitioner could call the codefendant who was eager to testify as a witness to corroborate Petitioner's account of events. Second, Petitioner could explain the identity of the unknown man in the earlier videotape.

Given the defense theory of the case, that of innocent presence at the scene of marijuana cultivation, counsel needed to explain who the man on the tape was if it was not Petitioner. Counsel made no effort to do so, even though Petitioner's brother Barry was the obvious and logical suspect.

Barry was one year younger than Petitioner and was of the same approximate height, weight, and build as Petitioner. Their hair and attire were similar. Barry had access to the site of the cultivation, which was on land owned by the mother of Petitioner and Barry. Barry had access not only to his mother's land, and to Petitioner's, he frequented both. Barry Smith had free access to the shed in which marijuana was found, as well as to four-wheel vehicles, including the one found on Petitioner's property after Petitioner consented to a search by the officers.

B. Counsel's deficient performance.

In the context of the Brady rule, the Tenth Circuit has evidenced its willingness to set aside even a capital murder conviction if the presence of another suspect creates a reasonable doubt as to the guilt of the defendant.

Bowen v. Maynard, 799 F.2d 593, 612 (10th Cir. 1986). As in the present case, in Bowen the presence of another suspect of the same physical description with a supposed motive to commit the crime cast doubt on the guilt of the charged defendant. Id. 799 F.2d at 611-12. Even without reading the opinion in Bowen, an experienced criminal defense lawyer should know that the presentation of another plausible suspect can create a reasonable doubt as to the guilt of a client charged with crime.

Counsel's failure to identify Barry Smith as possibly the man in the earlier videotape, especially in light of the Tenth Circuit's opinion in Bowen, falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Failure of counsel to investigate other plausible suspects who had motive, opportunity, and

ability to commit the crime, and to assert their guilt at trial, is ineffective assistance of counsel and cannot be justified by any strategic decision. Henderson v. Sargent, 926 F.2d 706, 710-12 (8th Cir. 1991). No conceivable trial strategy could justify foregoing so obvious a defense measure.

As we demonstrate below, this omission prejudiced the defense and the Court of Appeals departed from established precedent of this Court in holding otherwise.

C. The court below departed from this Court's pronouncements in overlooking prejudice.

The Court of Appeals resolved this issue by going directly to the prejudice requirement of Strickland. Appendix at 27. The court below summarized the other evidence against Petitioner and then stated that its "confidence in the outcome" was not undermined as a result

of counsel's alleged deficiencies. Appendix at 28.

This rather casual treatment of a constitutional violation was erroneous precisely because the Court of Appeals departed from this Court's formulation of the Strickland test for inadequate assistance of counsel. In the present case the jury heard the conflicting testimony regarding the events of the arrest, and saw the videotape, yet it could not come to a verdict. Only after it saw the tape a second time did it convict Petitioner. Thus, the totality of the evidence which the Court of Appeals relied upon to maintain the "confidence in the outcome" was insufficient to persuade the jury of Petitioner's guilt.

Particularly under these circumstances, no Court could reasonably have "confidence in the outcome", because the

jury manifestly was not confident of Petitioner's guilt even having heard the evidence relied upon by the Court of Appeals. Under Strickland the prejudice prong of the Sixth Amendment inquiry is whether, as a result of counsel's unprofessional errors, there exists a reasonable probability that the result of the proceeding would have been different. Id., 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Given this jury's demonstrated inability to reach a verdict until it reviewed the videotape, it is reasonably probable that the presentation of Barry Smith as a possible suspect would have resulted in an acquittal of Petitioner.

Under the present facts, the Court of Appeals departed from the standard established by this Court, and

substituted its own judgment of Petitioner's guilt for the likely result of the trial absent counsel's errors.

George Smith's claim to have been prejudiced at trial is not a claim that he has been denied the "luck of a lawless decisionmaker" as was the case in Lockhart v. Fretwell, 113 S.Ct. 838, 843 (1993). Nor does this claim of prejudice rest solely on a mere outcome determination, Id. 113 S.Ct. at 842, although the outcome at trial would likely have been different had counsel performed adequately.

Instead, as the Court stated with approval in Fretwell, Petitioner's claim is that his trial was rendered unfair and his conviction is unreliable Id., 113 S.Ct. at 844, because a good jury which almost acquitted him was denied relevant, probative, and compelling evidence that he is innocent and another specific

suspect may be guilty. As Justice O'Connor stated in her Fretwell concurrence, relying on Strickland:

> The assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

113 S.Ct. at 845, citing Strickland, 466 U.S. at 695. We respectfully submit that it is reasonably probable that Petitioner's jury, with the benefit of proper and available evidence, would have acquitted him.

The substitution of the Court of Appeals of its own view of Petitioner's guilt for that of the jury which heard the evidence was improper, and inconsistent with this Court's clear directives. This Court should grant certiorari and reverse the ruling of the Court of Appeals.

PROPOSITION II.

COUNSEL'S CONFLICT OF INTEREST IMPAIRED HIS PERFORMANCE

A. The conflict of interest.

As indicated above, the codefendant Bailey wanted to testify at trial and corroborate Petitioner's account of events the day of their arrest. Bailey had Judy Strickland, the Executive Director of Youth Services at Hugo, Oklahoma, Bill Pitts, the Program Director at Recovery Way (his boss at an alcohol and drug recovery center) and G.W. Collins, the Assistant Police Chief of Hugo, Oklahoma, prepared to testify as character witnesses for him. Such witnesses from law enforcement, drug counseling and youth services would have been compelling to cast doubt upon Bailey's involvement in a criminal drug cultivating scheme.

The jury was obviously unimpressed with the evidence against Bailey, because it could come to no verdict until it reviewed the videotape.

Bailey's explanation of his own innocence was vindicated by the Court of Appeals, which reversed his conviction for lack of evidence on all counts. Appendix at 21-23. The Court of Appeals found a striking lack of evidence against Bailey. Appendix at 12. Apart from his presence at the marijuana patch on the date of his arrest, there was no other evidence of Bailey's activities, his connections or any association with the enterprise. Appendix at 14. Calling it "admittedly a close call given our standard of review" the Court of Appeals struck down the conspiracy conviction. Appendix at 17. The Court of Appeals held that no jury could find beyond a reasonable doubt that Bailey's presence

and actions on August 15 in the patch located on Smith's property made him guilty of "possessing" the marijuana or "maintaining" the drying shed. Appendix at 22-23.

Thus, the government's case against Bailey was weak. Bailey's testimony would have bolstered Petitioner's, and vice versa. Bailey was innocent and his innocence could have reinforced Petitioner's testimony.

Nevertheless, their joint counsel decided neither Bailey nor his character witnesses should testify, apparently believing that it was in Bailey's interest to remain silent. Counsel's intention was probably to distance Bailey from Petitioner, because officers testified to supposedly inculpatory statements made by Petitioner. Obviously, it was in Petitioner's interest that Bailey testify to

corroborate Petitioner's own innocence. The Court of Appeals recognized this as a technical conflict of interest. Appendix at 32-33.

B. The error of the Court of Appeals.

The Court of Appeals recognized the correct legal standard, yet failed to apply it. The Court of Appeals stated:

> "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). If a defendant can show both an actual conflict and an adverse effect, no further showing of prejudice is necessary. Strickland, 466 U.S. at 692; Cuyler, 446 U.S. at 349-50; United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990).

Appendix at 30. Thereafter, the Court of Appeals held:

> That separate counsel could have "pressed" Bailey to testify, as Smith claims, is not a tactic of sufficient substance to render its unavailability an "adverse effect."

Appendix at 34.

The Court of Appeals forgot this Court's pronouncements in Cuyler:

> Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76, 62 S.Ct. at 467. Thus a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, 435 U.S., at 487-491, 98 S.Ct., at 1180-1182.

446 U.S. at 349-50. The Court of Appeals looked for some prejudice, rather than for an adverse effect within the meaning of this Court's pronouncements.

The Court of Appeals overlooked the affidavits submitted by Bailey and his character witnesses to the effect that they wanted to testify, but did not, on the direction of joint counsel. Thus, the observation by the Court of Appeals that Petitioner could not control Bailey's decision to testify (Appendix at 33) misses the mark. All the innocent Bailey needed was encouragement to testify.

It is obviously an "adverse effect" that joint counsel decided that Bailey, although ready, willing, and able to testify, and fortified by three reputable character witnesses should not testify, whereas independent counsel could have, and would have, urged the innocent Bailey

to testify to his innocence and bolster Petitioner's testimony.

C. Other Courts of Appeals have reached the correct result.

In similar circumstances, and following remand from this Court in Cuyler, the Court of Appeals for the Third Circuit stated:

> In so concluding, we reject the Commonwealth's argument that there was no adverse effect because had Carchidi been represented by independent counsel, he would have been advised to invoke, and probably would have invoked, the fifth amendment if called as a witness. This argument seeks to require Sullivan to demonstrate prejudice. But, as we noted earlier, a defendant need not demonstrate actual prejudice to make out a violation of his sixth amendment rights where he has already established an actual conflict of interest adversely affecting counsel's performance. Cuyler v. Sullivan, 446 U.S. at 349-50, 100 S.Ct. at 1718-19. Here, it was sufficient for Sullivan to show that defense counsel consciously rejected calling Carchidi as a witness in the Sullivan trial to present Carchidi's case in

> the best light at his subsequent trial. We conclude, therefore, that the district court did not err in these crucial determinations.

Sullivan v. Cuyler, 723 F.2d 1077, 1087 (3rd Cir. 1983). This is precisely the result which should have been reached in the present case.

As another Court of Appeals has held:

> An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing... Once we have found an actual conflict of interest, however, we have, without further inquiry, presumed prejudice to the defendant.

Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981). Ours is the flip side of the situation in Baty. In the present case, ready and probative evidence to assist Petitioner was withheld because joint

counsel presumably believed it would hurt codefendant Bailey. Clearly conflicting theories of defense presented themselves, and Petitioner's counsel's failure to urge Bailey's testimony was an "adverse effect" in the representation from which prejudice may be presumed, if prejudice were actually necessary.

Commenting on Baty in a later case, the Court of Appeals for the Eleventh Circuit stated:

> As Baty indicates, nothing in Cuyler requires proof that an actual conflict of interest adversely affect counsel's performance or impair his client's defense. 661 F.2d 391, 396. See also, Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978)("**The evil...is in what the advocate finds himself compelled to refrain from doing**"). Once a petitioner shows that his trial counsel actively represented conflicting interests, he has represented conflicting interest, he has established the constitutional predicate for an ineffective assistance claim. Cuyler, 446 U.S. at 349-50, 100 S.Ct. at 1718.

Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983).

The evil in the present case was what counsel found himself compelled to refrain from doing. He had to refrain from urging Bailey to take the stand and testify to his own innocence in order to bolster Petitioner's innocence. This adverse effect in his representation violated Petitioner's right to effective assistance of counsel, and the Court of Appeals erred and created a split in the circuits in failing to recognize it as such.

CONCLUSION

Because the Court of Appeals substituted its own view of Petitioner's guilt for the correct standard of reasonable probability of a different result given the jury's indecision, it failed to recognize Petitioner's right to counsel had been violated. Further, the Court of Appeals misconstrued the standard for an adverse effect on joint counsel's performance. The latter error creates a split in the Circuits on this important constitutional issue. The Court should grant a writ of certiorari to review these errors and should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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